

Agreement on protecting employees when providing data to US authorities of 29 May 2013: FAQs

What is the purpose of the agreement?

- The purpose of the agreement is to protect employees from the potential negative consequences of financial institutions in Switzerland providing employee data to US authorities in connection with tax disputes.

When did the agreement come into effect?

- The agreement was signed on 29 May 2013.
- It came into effect on 29 August 2013 upon publication by the US Department of Justice of the programme to resolve the tax dispute between Swiss banks and the USA.

Who are the parties to the agreement?

- The agreement was negotiated between and entered into by the Swiss Bankers Association, the Employers' Association of Banks in Switzerland and the Swiss Bank Employees Association.
- The parties consulted closely with the State Secretariat for International Financial Matters (SIF) during the negotiations.

Which financial institutions does the agreement apply to?

- The agreement applies to all financial institutions that have provided or will provide employee data to US authorities in connection with processing/resolving a tax dispute.
- Any financial institutions that had already completed their dealings with US authorities before the agreement came into effect are excluded.

What data transfers are affected?

- The agreement covers business documents and data containing employee names provided to US authorities by financial institutions in Switzerland under the decision of the Federal Council of 4 April 2012 and the US Department of Justice programme of 29 August 2013.

How is the agreement applicable?

Basic principle

- The agreement is between employer and employee representatives of the banking sector (the Employers' Association of Banks in Switzerland and the Swiss Bank Employees Association) and the industry association the SBA.
- The agreement does not impose direct legal obligations on the associations signing below.
- The associations will ensure that their members implement the agreement correctly under members' duty of compliance.
- It has not been declared a generally binding agreement between employer and employee representatives.

Applicability based on decrees under Article 271 of the Swiss Penal Code (StGB)

- Financial institutions intending to participate in the US programme, cooperate with and provide data to US authorities need to have an authorisation from the Federal Council according to Article 271 StGB.
- According to the model Federal Council decree of 3 July 2013, such authorisation is dependent amongst other things on compliance with the obligations set out in the agreement of 29 May 2013 between the Employers' Association of Banks in Switzerland, the Swiss Bankers Association and the Swiss Bank Employees Association.
- Failure to comply with the terms and conditions is punishable under Article 292 StGB.
- This means that compliance with the obligations arising from the agreement is mandatory, under threat of criminal sanctions.

What does a bank have to do to become subject to the agreement?

- The model Federal Council decree of 3 July 2013 on authorisation under Article 271 StGB stipulates an obligation to enter into an agreement with employee associations to ensure employees enjoy the greatest possible protection.
- The wording prescribed matches the wording of the agreement of 29 May 2013.
- The notes to the model decree expressly state that the condition on entering into an agreement is deemed to be met by the agreement between the Swiss Bankers Association, the Employers' Association of Banks in Switzerland and the Swiss Bank Employees Association of 29 May 2013.
- Financial institutions that receive a decree under Article 271 StGB and are members of the Employers' Association of Swiss Bank and/or the Swiss Bankers Association need take no further action to ensure their employees are protected. Provided they comply with the agreement of 29 May 2013, they satisfy the conditions.

What are the obligations under the agreement?

Duties to provide information and rights to receive information

- To set up or designate a coordination office where all current and past employees can exercise their rights to consult documents and receive information.
- To inform all employees that the coordination office has been set up and how it can be contacted and to tell them about the hardship fund.
- To inform in advance all staff potentially affected about the scope and nature of documents to be provided and the period from which they originate. To inform former employees where this does not require unreasonable effort.
- To allow an appropriate period for seeking information/consulting the relevant personal data.
- To provide information about the options for legal protection if an employee affected objects to the information concerning them being handed over.
- To inform the monitoring commission about general employee announcements concerning upcoming data transfers.
- Upon request by an employee, to issue a written confirmation that they are affected by data has been transferred to US authorities.

Duties of care

- To ensure compliance with the duties of protection that arise from the duty of care under labour law.
- In particular, to cover lawyers' costs for employees subject to criminal charges in the USA by virtue of their professional activities for the bank (except in cases of gross personal culpability).

Protection against discrimination

- Financial institutions shall not ask at job interviews whether applicants have been personally affected by data transfers.

Protection against dismissal

- Being affected by data transfers shall not be grounds for dismissing an employee.
- The agreement stipulates special rules of evidence: the assumption shall be that an employee was dismissed for being affected by a data transfer where the employee is able to plausibly demonstrate this.
- Any employee dismissed shall be entitled to demand justification for the dismissal under Article 335 (2) of the Swiss Code of Obligations.

Cases of hardship

- The individual financial institutions are not responsible for setting up and monitoring the hardship fund; this will be done by the signing associations. See below.

How does the hardship fund work?

- The hardship fund will be launched by the SBA with capital of CHF 2.5 million.
- The fund covers cases of hardship involving current or former employees who find themselves in difficult personal, financial or economic circumstances because of the transfer of documents or data containing the employee's name to US authorities.
- The hardship fund is a subsidiary institution. Any contractual/extra-contractual duties a bank has to its employees take precedence.
- The Swiss Bank Employees Association will consider and process applications for support. The rules and application form can be found at www.spbv.ch.
- The hardship fund is open to all employees who have been affected, regardless of whether or not they are members of the Swiss Bank Employees Association.

What is the address of the monitoring commission?

Any communications concerning data transfers should be sent to:

- The US Data Transfer Agreement Monitoring Commission
c/o Von Ins Wyder Zumstein
Bollwerk 21 PO Box
3001 Berne

Where can I find the text of the agreement of 29 May 2013?

The agreement on protecting employees when providing data to US authorities of 29 May 2013 is available in German, French, Italian and English via the following link: www.agv-banken.ch

Further information

- The Swiss Bank Employees Association: Denise Chervet, Central Secretary, 0848 000 885
- Employers' Association of Banks in Switzerland: Balz Stückelberger, Managing Director, 061 295 92 95
- Swiss Bankers Association: Lucas Metzger, Member of the Executive Board, 061 295 93 93